the meaning of the Section and that if there had been evidence of inducement, threat or promise, it would have made the confession irrelevant, but no such inducement, threat or promise was alleged or proved. It also appeared to me that Sections 25 and 26 of the Evidence Ordinance are aimed at protecting an accused person from any undue influence from a member of the Police Force and accordingly that a civilian who effected an arrest is not a person against whom an accused person required protection unless he was a 'person in authority' using undue influence.

"5. In charging the jury I warned them (1) that there was a conflict of evidence as to the confession and that the only evidence of confession was the uncorroborated statement of a witness who was probably unfavourable to the accused, and (2) that the words used might be merely words of bravado and might not really mean that the accused admitted the offence. I cannot, however, say that the admission of this evidence did not influence the jury in arriving at their verdict.

"6. On the conviction of the accused sentence of death was passed, but on the application of the accused's counsel I agreed to reserve the question of the admissibility of the confession for the Supreme Court and directed that the convict should be remanded to prison pending the decision of the Supreme Court under Section 312 (2) of the Criminal Procedure Code."

Stuart for the Accused.

Inspector Judge authorised Tirlok Singh to arrest accused. Tirlok Singh was in a position of authority. Accused was in police custody and confession should have been excluded.

McElwaine, D.P.P. for the Crown was not called upon.

The judgment of the Court was delivered by

SPROULE, AG. C.J.—Tirlok Singh was not a policeman and accused was not in the custody of a police officer when he made his confession. The evidence of the confession to Tirlok Singh was rightly admitted.

It was questionable whether the trial judge was right in saying that Tirlok Singh was a person in authority, but as it was clear that no inducement had been made by Tirlok Singh to Tara Singh to confess it was unnecessary to discuss this point.

Note.—Mr. Ameer Ali in his notes to section 26 of the Indian Evidence Act points out that an excise inspector is not a policeman. In *Empress* v. *Tatye bin Appaji*, I.L.R. 20 Bom. 795, a confession to a keeper of a jail was held to be admissible.
See too *Harbhayan* v. *Emp.*, I.L.R. 54 Cal. 601.

[CRIMINAL REVISIONAL JURISDICTION]

REX v. NADAISON

[POLICE CASE No. 5700 OF 1932.]

[CRIMINAL REVISION No. 5 OF 1932]

Abetment of attempt to cheat—Police Supervision—Cr. P.C. sections 12 (4), 178 (m) (iii): 109, 420, 511.

When a case is remitted by a Police Court to the District Court for sentence under Section 178 (m) (iii) of the Cr. P.C. the District Judge may in addition to ordering Police Supervision impose the same sentence as he could have imposed had he tried the case himself.

Abetment of an attempt to cheat should be charged under Section 116 and Sections 417 or 420 of the Penal Code.

The facts sufficiently appear from the judgment. Two persons were convicted. As the other man (Tan Choon Hong) was sentenced to a fine of $30 by the Police Magistrate this revision was not concerned with his case.

McElwaine, D.P.P. asked for revision of the sentence on Nadaison.

When a case is transferred under Section 178 (m) (iii) the District Judge cannot award greater substantive punishment than the convicting magistrate could impose. Transfer is solely for the purpose of allowing the District Judge to impose Supervision which the convicting magistrate had no power to order.

Other sections provide for transfer of serious cases for trial in District Court.

When sections 109 and 511 Penal Code are combined in a charge the charge is really under 116.

The charge is therefore under 116 and 420 and maximum punishment is one quarter of seven years. Accused was therefore not liable to supervision under Section 12 (4) Cr. P.C. and Section 178 (m) (iii) does not apply.

Cur. Ad. Vult.

5—11—1932.

TERRELL, J.—This matter came before the Court by way of revision under Section 312A of the Criminal Procedure Code at the instance of the D.P.P.

The accused was tried together with one Tang Choon Hong who was charged with attempted cheating under Sections 511 and 420 of the Penal Code and convicted. Tang Choon Hong was sentenced to six months' R.I. The accused was charged with abetting under Section 109 of the Penal Code the offence charged against Tang Choon Hong.

There were also additional charges against both accused under rules 7 and 8 of the Municipal Water Supply By-laws (Gazette Notification No. 542 of 1928) but as the offence both under the Penal Code and under the Municipal By-laws was really the same the accused could not in view of Section 71 of the Penal Code be punished

for both and it is only necessary to consider the charge under the Penal Code.

On being found guilty Nadaison admitted a previous conviction for robbery and the case was thereupon remitted to the District Court for sentence under Section 178 (m) (iii) of the Penal Code. The District Judge sentenced him to 12 months' R.I. and 2 years' police supervision, presumably under Section 12 (4) of the Criminal Procedure Code.

The learned D.P.P. was certainly well advised to bring the matter before the Supreme Court as the trial and conviction of Nadaison was accompanied by a complete disregard of the provisions of the Criminal Law in various particulars which I will proceed to examine.

To begin with I cannot understand why both accused were charged under Section 420 of the Penal Code instead of with an offence under Section 415 the punishment for which is one year under Section 417, whereas the punishment under Section 420 may be seven years. Although both sections 415 and 420 speak of "delivery of property" I consider that in Section 420 such property should be regarded as *ejusdem generis* with a 'valuable security' which is referred to later in the section and that in any case Section 420 should be reserved for serious cases only (see Gour Vol. II Section 4675). The offence was not completed and therefore Tang Choon Hong was rightly charged also under Section 511 which provides for the punishment for attempting to commit an offence, the punishment being generally one half the punishment provided for the completed crime.

Nadaison, as I have said, was charged with abetment under Section 109 of the Penal Code, but when, as in this case, the offence has not been committed, the charge of abetment should have been under Section 116 which provides for a punishment not exceeding one-quarter of the punishment provided for the offence. I take this to mean one-quarter of the punishment provided by Sections 417 or 420 as the case may be, and not one-quarter of the offence of "attempting" which would result in the abettor being only liable for one-eighth of the punishment provided for the completed offence.

The section of the Criminal Procedure Code which enables police supervision is Section 12(4) which reads as follows:—

> "When a person having been convicted of an offence punishable with imprisonment of either description for a term of two years or upwards, is convicted of any other offence also punishable with imprisonment of either description for a term of two years or upwards, a District Court may, in addition to any other punishment to which it may sentence him, direct that he shall be subject to the supervision of the police for a period of not more than two years, commencing immediately after the expiration of the sentence passed on him for the last of such offences."

It follows therefore that even if the learned magistrate had been right in charging Nadaison under Section 420 of the Penal Code, the maximum punishment would have been 1¾ years and no case for police supervision could possibly have arisen under Section 12(4) of the Criminal Procedure Code.

When the matter came before the learned District Judge he did not appear to have considered that Nadaison should have been charged under Sections 417 and 116 instead of under Sections 420, 511 and 109, and accordingly assumed that the accused had been convicted of an offence punishable with imprisonment for 2 years and upwards, having previously been convicted of robbery which is similarly punishable. Accordingly he proceeded as if Section 12(4) was applicable, and the sentence he imposed included two years police supervision.

The sentence inflicted by the learned District Judge was 12 months R.I. and it was argued by the learned D.P.P. that the trial magistrate's jurisdiction being limited to passing a sentence of 6 months' R.I., the District Judge on the transfer of a case to him under Section 178 (m) (iii) is similarly limited and that the only additional punishment which he can inflict in a case to which Section 12(4) is applicable is police supervision. This question depends on the construction of Section 178 (m) (iii) which was introduced into the Criminal Procedure Code by the amending Ordinance of 1927. It reads as follows:—

> "If the Court, being a Police Court, finds the accused guilty or a plea of guilty is recorded against him, it shall pass sentence according to law, or if it be found that the accused is a person liable to police supervision shall transfer the case to a District Court for sentence and forward to that Court the notes of evidence, if any."

Now there are various sections in the Criminal Procedure Code which provide for the transfer of cases from a Police Court to a District Court for trial. Section 157 provides that if at any time before or during an inquiry it appears that the case is one which ought to be tried by a District Court, proceedings may be stayed and the case transferred. Under Section 183(1) the D.P.P. may at any stage of the proceedings transfer a case to the District Court. Section 249 enables a Police magistrate in the case of a person that such magistrate considers to be an habitual offender to transfer the case to the District Court, or in exceptional cases to commit

the accused to the Supreme Court. Apparently this section is only applicable to the rare cases in which previous convictions can be proved as part of the evidence for the prosecution. In other cases the magistrate would not know that the accused was a habitual offender until the trial had been concluded.

Section 178 (m) (iii) is the only section which provides for transfer to the District Court for sentence, and such transfer can be made "if it is found that the accused is liable to police supervision." It is of course arguable that the meaning of the section is simply that the case is to be transferred in order that the Court may have jurisdiction to order such supervision. On the other hand this is not what the section says —the section provides that the case be transferred for sentence and *prima facie* that means any sentence which the District Court has jurisdiction to impose. Although it is unfortunate that the section is so obscurely worded, I have come to the conclusion that the words "if it be found that the accused is a person liable to police supervision" simply means "if he is a person convicted of an offence punishable with imprisonment for two years when there has been a previous conviction for an offence similarly punishable."

It is a general principle of the Criminal Law that a heavier sentence can be given when there has been a previous conviction (see Archbold 28th Ed. pages 236 and 237 and *Rex* v. *Metcalfe*, 9 Cr. App. R. page 7 at page 9), and I see nothing in Section 178 (m) (iii) to exclude this principle. I think therefore that on the case being transferred the District Court can give such sentence as it could have given if the case had been heard before it.

As I have found that the accused have been charged under Sections 417 and 116 instead of Sections 420, 511 and 109, the maximum sentence which could have been passed was 3 months R.I. and such sentence cannot be enchanced on transfer to the District Court as the provisions of Section 12(4) are not applicable.

Notwithstanding the grave irregularity of the proceedings I think that the accused was guilty under Sections 417 and 116 and that there has been no failure of justice within the meaning of Section 428 of the Criminal Procedure Code. I would, therefore, uphold the conviction but quash the sentence and substitute a sentence of three months R.I.

Conviction upheld. Sentence reduced.

NOTE:—A practical difference between sections 417 and 420 is that in cases under this former the police cannot arrest without warrant which in cases under the latter they may arrest without warrant.

PENANG.

[ORIGINAL CIVIL JURISDICTION]

IN THE MATTER OF THE PETITION OF THE STRAITS STEAMSHIP COMPANY, LIMITED. Plaintiffs.

and

THE ATTORNEY-GENERAL Defendant,

[PENANG CROWN SUIT No. 1 of 1932]

Shipping and Navigation—Neglect of Statutory Duty—express authority by Government—resulting loss to Steamship Co.—claim for compensation—Crown Suits—tort.

Where an Ordinance imposes a duty with the object of improving the professional status of certificated officers in the British Merchant Service a Company who, by reason of another's neglect of statutory duty, suffers a loss arising out of a mischief not contemplated by the Ordinance, is not entitled to maintain an action in respect of such loss.

Since 1927 the Colonial Government had exempted six small motor vessels plying between the Burmese ports and Penang from the operation of Section 14 of Ordinance No. 125 (Merchant Shipping) which requires vessels to be properly provided with officers duly certificated according to law and in February 1932 issued instructions to the Port Officer of Penang not to prosecute the owners or masters of the offending vessels under Sections 14 and 17 of this Ordinance nor to use his discretion in that behalf. The petitioners, a Steamship Company owning ships which had traded between Penang and Mergui and which were manned with a complement of duly certificated officers, alleged that in consequence of such exemption, the motor vessels were a danger to navigation and the owners thereof were able to run them at an exceptionally low cost and to compete unfairly with their own ships. They further alleged that they had suffered damage,

Held, that the petitioners could not recover, the object of the Ordinance being to ameliorate the condition of masters, mates and seamen and to maintain discipline in the British Merchant Service and not as a precaution against the loss of trade.

MOTION to shew cause why the Petition of Right filed by the Straits Steamship Co., Ltd., against the Attorney-General claiming compensation from the Government of the Straits Settlements in the sum of $154,392.59 should not be rejected.

The facts and arguments are related in the Judgment below.

Hume, (*Rees Williams* with him) for the Plaintiffs.

The Honourable Mr. J. V. G. Mills, Acting Attorney-General (*Bassett* with him), for the Defendant.

Cur. Ad. Vult.